No. 94013-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

HARBOR PLUMBING,
Plaintiff/Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,
Defendant/Respondent.

APPEAL FROM THE THURSTON COUNTY SUPERIOR COURT
Honorable Mary Sue Wilson, Judge

BRIEF OF APPELLANT

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1. INTRODUCTION

This case gives rise to issues of first impression. Harbor Plumbing's two claims were dismissed for non-justiciability under the Uniform Declaratory Judgment Act, RCW 7.24 ("UDJA") and failure to state a claim cognizable under the Administrative Procedure Act, RCW 34.05 ("APA"). The main substantive question common to Harbor's claims below was whether the state may constitutionally compel private citizens to wear state-issued credentials. Harbor appeals the dismissal in hopes of reaching the merits on remand.

The case arises from an enabling statute and that which the statute enabled: a seemingly new species of advisory administrative code. Though the appellant is a plumber, there is also a companion case pending against the Department in Thurston County Superior Court brought by an electrician, also represented by undersigned counsel. The electrician unsuccessfully sought joinder with this case.

In 2009, the Legislature statutorily enabled the Department to promulgate rules requiring private citizens in the plumbing, electrical, and conveyance trades to wear their licensing documents. The same sentence was added to the plumbing and electrical chapters of the RCW. "The department may establish by rule a requirement that the person…wear and visibly display his or her certificate or permit." RCW 18.106.020(1) and 19.28.271(1).

In 2012 and 2015, respectively, the Department thereupon proposed rules requiring worn electrical and plumbing licenses. The operative language was identical in both proposed rules, though not in the finalized versions.

Both Harbor and the electrical plaintiff claim the Department proposed the rules without requisite notice under the APA. The Department finalized the electrical requirement as originally proposed. The Department modified the plumbing version after the announced effective date, and after Harbor filed its complaint, by adding the words "and is encouraged to."

Lacking any judicial or legislative interpretation or definition of such an advisory apparatus, and for lack of a better term, both parties have denoted it a 'non-rule.' CP at 37, 86. Harbor finds no other example of an advisory section in the Washington Administrative Code ("WAC").

The 'non-rule' states, in relevant part:

> (3) To work in the plumbing trade, an individual must possess, **and is encouraged to** wear, and visibly display on the front of the upper body a current, valid plumber certificate of competency, medical gas endorsement, or plumber trainee card.
> (a) The certificate may be worn inside the outer layer of clothing when outer protective clothing (e.g., rain gear when outside in the rain, arc flash, welding gear, etc.), is required.
> (b) The certificate may be worn inside the protective clothing so that when the protective clothing is removed, the certificate is visible. A cold weather jacket or similar apparel is not protective clothing.
> (c) The certificate may be worn inside the outer layer of clothing when working in an attic or crawl space or when operating equipment where wearing the certificate may pose an unsafe condition for the individual.

WAC 296-400A-024(3) (emphasis added) (the final rule language is also rearranged, having subsections 1 and 2 now located where 2 and 3 appeared in the original rule proposal. CP at 4, 44, 52-3, 56, 57, 60-1).

Harbor challenged the enabling statute, RCW 18.106.020, under the UDJA. Harbor also challenged the promulgation of the 'non-rule' under the APA. Both challenges were dismissed, the former on justiciability and the latter for failure to state a claim.

	PLUMBERS	**ELECTRICIANS**
Legislation:	Laws of 2009 ch. 36 § 2	Laws of 2009 ch. 36 § 6
Enabling Statute:	RCW 18.106.020(1)	RCW 19.28.271(1)[1]
Rule:	WAC 296-400A-024	WAC 296-46B-940
Effect:	Advisory/'non-rule'	Mandatory rule

In the trial court, Harbor defended the justiciability of its challenge to the enabling statute on the basis that enabling statutes enable rule-promulgation (as opposed to rule finalization), and that rule-promulgation had indeed occurred, irrespective of its outcome. Harbor also urged that the repeated conduct of the Department -first as to electricians, then as to plumbers- indicated at least the mature seeds of a dispute. Harbor further argued that the state forcing private citizens to wear 'papers,' and the Department's apparently-systemic bypassing of the APA judicial review

[1] The electrical plaintiff, Hired Hands, has moved for leave to amend its complaint to challenge RCW 19.28.271(1) in the companion case, Hired Hands LLC v. Dept. of Labor & Indus., 16-2-01850-34.

process, are issues of major public importance. Though heavily briefed and argued, the trial court did not appear to consider this 'major public importance' alternative to justiciability.

Because of the consecutive instances of rule promulgation, Harbor additionally argued that its claims are capable of repetition yet evading review. This argument was also raised before the trial court in briefing but not discussed orally.

The trial court also dismissed the APA challenge on the basis that, when the Department transformed WAC 296-400A-024(3) from a rule to 'non-rule,' it no longer fit any of the categories permissible for challenge under RCW 34.05.570. In other words, the 'non-rule' was neither a "rule," nor an "agency order," nor "other agency action," and therefore exempt from judicial review. See RCW 34.05.570(2), (3), and (4).

2. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the Department's motion for dismissal by judgment on the pleadings as to the UDJA challenge of RCW 18.106.020(1) (the 'enabling' statute).

2. The trial court erred in finding no justiciable controversy as to the enabling statute, for lack of dispute (or mature seeds thereof) and lack of direct and substantial interest of Harbor Plumbing.

3. The trial court erred in finding a worn license requirement and the repeated statutory enablement thereof is not of major public importance.

4. The trial court erred in dismissing the challenge to the enabling statute because its implementation is capable of repetition yet evading review.

5. The trial court erred in dismissing the APA challenge to the rulemaking process as a claim not properly stated.

6. The trial court erred in holding that the strictures of the APA may be avoided by codifying an advisory 'non-rule' in the WAC, and that this is exactly what the APA contemplates.

7. The trial court underestimated the importance of holding executive branch rulemaking to the strict procedural confines of the APA, which exists to counterbalance the dangers inherent in the extreme substantive deference afforded these agencies.

8. The trial court applied code pleading standards in dismissing the challenge to WAC 296-400A-024(3).

Issues related to assignments of error.

Whether an enabling statute gives rise to an actual dispute the moment the enabled rulemaking begins, or at finalization of a binding rule (assignments of error 1 and 2).

Whether identical language used in two enabling statutes, resulting in two identical rule proposals by the same defendant, gives rise to the mature seeds of a dispute, though the second rule was finalized as a 'non-rule' (assignments of error 1 and 2).

Whether Harbor's interest in the constitutionality of the enabling statute, RCW 18.106.020(1), is direct and substantial (assignments of error 1 and 2).

Whether the issues of state government forcing private citizens to wear state-issued credentials, and the Department's newly created mechanism for evading judicial review are of major public importance (assignments of error 1 and 3).

Whether the repeated enactments of enabling statutes and subsequent filings of worn license rule proposals, one of which evaded review by finalization as a 'non-rule,' constitutes an issue capable of repetition yet evading review (assignments of error 1 and 4).

Whether the RCW 34.05.320 requirement to adequately summarize proposed rules arises at the moment the rule proposal is filed in the Washington State Register (assignments of error 5, 6 and 7).

What legal 'apparatus' did the Department enact when it codified the advisory version of the proposed license requirement into the WAC (assignments of error 5 and 6)?

Whether Harbor's claim that the Department violated rulemaking procedure is retroactively mooted by later finalization of whatever legal apparatus appears at WAC 296-400A-024(3) (assignments of error 5, 6 and 7).

Does the APA allow for 'non-rule' codification in the WAC? (assignments of error 5, 6 and 7).

Does the apparatus the Department finalized as WAC 296-400A-024 fit within any of the categories of allowed challenge under RCW 34.05.570(2), (3), or (4) (assignments of error 5, 6 and 7)?

If WAC 296-400A-024 does fit within a category susceptible to challenge, does Harbor's pleading of RCW 34.05.570(2) operate to preclude review under the more appropriate subsection of that statute (assignments of error 5 through 8)?

3. STATEMENT OF THE CASE

In 2009, the Legislature enacted the following sentence in two statutes: "The department may establish by rule a requirement that the person…wear and visibly display his or her certificate or permit." See e.g. RCW 19.28.271(1) and 18.106.020(1); Chapter 36, Laws of 2009.

Upon this authority, the Department set about promulgating rules that require workers wear their licenses. See WAC 296-46B-920 for electricians and 296-400A-024 for plumbers. Like their respective enabling statutes, both rules contained identical operative language at the proposal stage. CP at 4, 44, 57, 60-61. The electrical rule was finalized as proposed but the plumbing version was finalized with the words "is encouraged to" inserted before "wear." Id.; supra at pg. 2. Lacking a better term, both parties have characterized the plumbing WAC as a "non-rule." See e.g. CP at 21, 86.

Christopher Dubay, owner of Harbor Plumbing, went to the supply house to pick up parts for his work day. It was the second week of March

2016. RP 10:17-22. He noticed some of his fellow plumbers were wearing their licenses and asked them why. Id. They informed him that the Department had passed a new rule some weeks before, effective March 1, 2016. Id.

Mr. Dubay contacted undersigned counsel, who found the rule proposal on the Code Reviser's website under WSR 15-13-099. CP at 70. Because the new rule had not been included in the WAC on the same website, and because the website indicated it had not been updated since February, counsel emailed the Plumber Certification Supervisor asking about the new rule. CP at 44-45. The Supervisor responded with the full mandatory language of WAC 296-400A-024. Id.

Counsel then visited both the plumbers' union locals' websites. Each contained the same language and warnings to comply by March 1, 2016. CP at 60-61. The Department had also repeatedly broadcast, through emails to plumbers and the Labor and Industries listserv, that "Visible License Requirement starts March 1, 2016." CP at 50-58 (citing lni-plumberlistserv@listserv.wa.gov).

After initially seeking an injunction and challenging the mandatory language, Harbor Plumbing realized the rule had not been finalized as proposed. Additionally, Harbor realized the Department had only been simulating enforcement, and that there existed an enabling statute as well, which prompted the Second Amended Complaint ("Complaint"). CP at 3-6.

The Complaint challenged the enabling statute, RCW 18.106.020, on constitutional grounds under the UDJA and the worn license rule, WAC 296-400A-024, on procedural grounds under the APA. Id. The claims seeking injunction and facial invalidation of the rule were dropped as moot because the Department finalized a 'non-rule.'

Harbor also sought to join an electrical contractor because the same defendant had formerly proposed the same language as to electricians, and had enacted the mandatory language. CP at 23.[2] Joinder was denied. RP 8:25-9:3.

The Department moved for dismissal under CR 12(c) for non-justiciability of the constitutional challenge, and under CR 12(b)(6) for failure to state a claim against the procedural conduct of the Department in rule making. CP at 7-19. Both motions were granted. CP at 93-95; RP 16-21. In explaining the basis for both its rulings, the court's starting point was the non-mandatory nature of WAC 296-400A-24(3). RP 16:13-18:15.

The trial court held that the advisory nature of the WAC subsection precluded any "actual present existing mature seeds" of dispute, or "direct and substantial interest" of Harbor Plumbing, regarding the constitutionality of the RCW section that had enabled its promulgation. RP 18:16-19:10.

[2] The companion case, Hired Hands LLC v. Department of Labor & Indus., has progressed so as to moot certain arguments found in the Clerk's Papers. See e.g. CP at 30-31. Most importantly, the legislature did enact an electrical enabling statute, RCW 19.28.271, containing language identical to the plumbing statute challenged below: "The department may establish by rule a requirement that the person also wear and visibly display his or her certificate or permit." Hired Hands counsel had overlooked this language until the Department cited it in the companion case, which prompted a revision of Harbor's Statement of Grounds for Direct Review. Both the electrical and plumbing enabling statutes were passed under Chapter 36, Laws of 2009. See CP at 64.

The court gave little weight to the fact that the same defendant had previously used the same language in the electrical enabling statute to enact a mandatory version of the same rule. RP 8:3-10:8. Harbor had argued this repeated use of the same language created at least "mature seeds" of a dispute and that the elevated level of public importance obviated the justiciability requirement anyway. RP 9:18, 10:2.

Similarly, the court based its dismissal of the APA claim on the advisory nature of WAC 296-400A-024(3). The court characterized Harbor's APA claim as a "challenge to a rule," then qualified the statement with, "I'll put 'rule' in quotes...." RP 16:18-25.

The court reasoned that because the APA allows for policy statements, the court "understood that to be a recognition that [rules can be] advisory [and] still [be] enacted under the WAC process...[and] certainly the APA acknowledges...mandatory rules and advisory rules." RP 18:5-12. However, the court found "that this is not a rule under the APA...[but]...the APA does allow for mandatory rules and these advisory rules." RP 19:12-15. The court then applied the definition of "rule" per RCW 34.05.010(16), finding that the WAC section is not a rule as defined therein. RP 19:16-22.

To Harbor's policy argument that the Department has fashioned a "ripcord" method for evading judicial review under the APA by codifying a non-rule at the last moment, the court reasoned in dicta, "this is exactly

what the APA contemplates which is sometimes the agency considers input and decides on a different course." RP 15:10; 21:1-3.

4. SUMMARY OF ARGUMENTS

Harbor Plumbing pleaded and argued a challenge to RCW 18.106.020 that was either justiciable or not required to be justiciable under the doctrines of 'Major Public Importance' or 'Capability of Repetition Yet Evading Review.'

Harbor Plumbing's procedural challenge to the rulemaking under RCW 34.05.320 and .570 was not mooted by the Department's later finalization of a 'non-rule' in WAC 296-400A-024(3).

Harbor's arguments below were hampered by the final transmutation of WAC 296-400A-024(3) into a 'non-rule.' The Department successfully wielded this mutation in talismanic fashion against both claims. Harbor will argue that the amorphous nature of the 'non-rule' should have instead favored adjudication on the merits, or that such an apparatus has no place in the Washington Administrative Code.

5. ARGUMENTS

5.1 Standard of review for constitutional claims and justiciability determinations is *de novo.*

The challenge to RCW 18.106.020(1) was dismissed on Defendant/Respondent's CR 12(c) motion for judgment on the pleadings. The Court has resolved to "treat a CR 12(c) motion for judgment on the pleadings identically to a CR 12(b)(6) motion to dismiss for failure to state a claim." P.E. Sys., LLC v. CPI Corp., 176 Wn.2d 198, 203 (2012).

The trial court dismissed the constitutional challenge for lack of justiciability. CP 94:20-21. "The justiciability of a claim is a question of law that [courts] review de novo." Am. Traffic Sols., Inc. v. City of Bellingham, 163 Wn. App. 427, 432 (2011) (citing Coppernoll v. Reed, 155 Wn.2d 290, 296 (2005)).

The Court has defined justiciability as follows:

> (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Lawson v. State, 107 Wn.2d 444, 460 (1986)

The trial court based its ruling upon failure of prongs one (1) and three (3) of the justiciability analysis. RP 19:1-10.

5.2 Justiciability Prong 1 was satisfied by the enablement of the enabling statute.

The first justiciability prong requires "an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement." To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411 (2001) (quoting Diversified Indus. Dev. Corp., 82 Wn.2d at 815; citing Wash. Beauty Coll., Inc. v. Huse, 195 Wash. 160, 164-65 (1938)).

The definition of "enabling statute" reads, in pertinent part: "A law …that creates new powers; esp., a congressional statute conferring powers

on an executive agency to carry out...delegated tasks." Black's Law Dictionary, (9th Ed., for the iPhone/iPad/iPod touch. Version: 2.1.2 (B13195) 2009-2013). Enabling statutes do not directly regulate the individual. Therefore, to confer power is to create actual dispute, and to invoke that power is to dispense with all hypothesis and speculation.

The challenged statute enables that "[t]he department may establish by rule a requirement that the person...wear and visibly display his or her certificate or permit." RCW 18.106.020(1). The process for establishing a requirement by rule is set forth in the APA.

The first steps of 'establishing a rule' appear in RCW 34.05.310 et seq. But for the enabling effect of RCW 18.106.020(1), the Department would have been without authority to take the steps -to even break inertia- as set forth in RCW 34.05.310 et seq. Yet, it did just that (insufficiently, as Harbor hopes to establish in the trial court).

The Department filed a Preproposal Statement of Inquiry on June 16, 2015. CP at 70. The Department proposed to force private citizens working in the plumbing trade to wear their state licenses. See e.g. CP at 50-56. At this point, the power of the enabling statute had been invoked, triggering rulemaking, and creating an actual, present and existing dispute.

The dispute is not merely possible, nor merely dormant, hypothetical, speculative, or moot. If the Department had never engaged in rulemaking, the dispute might be merely possible. Here, rulemaking powers were conferred, then invoked, and rulemaking began with a

violation of the APA notice and comment requirements, and with a proposal to violate the state and federal constitutions. CP at 5.

In the context of the Department's previous conduct, the dispute is far from dormant, hypothetical, speculative or moot. The exact same enabling language, enacted in the same legislative session, has previously enabled the same defendant to engage in the same rulemaking process, beginning with the same proposed rule language, as to electricians.

a. Mature seeds of dispute existed.

The 'mature seeds' standard is not often delineated in precedent, though a lack of mature seed is inherent in any non-justiciability finding, of which there is abundance. The following cases were selected because they either expressly declare maturity of seed or otherwise render form to the liminal area between maturity and immaturity.

In Washington State Coalition for the Homeless v. Department of Soc. & Health Servs., the Court affirmatively found "there are the mature seeds of a dispute as to the meaning of 'reasonable efforts' in the context of homeless children who are affected by the state and federal laws governing foster care placements...." 133 Wn.2d 894, 918 (1997).[3]

The plaintiffs were an advocacy group and a class of families, either "homeless or threatened with becoming homeless." Id. at 902. The Court found a "mature seed" in the issue of whether the judiciary had

[3] The Coalition opinion also found justiciability would have been unnecessary because the issues were of such major public importance. Id. at 918. The Court did not clearly parse which issues were adjudicated on the bases of public importance, actual controversy, or mature seeds thereof.

responsibility to make a "determination that reasonable efforts have been made and that reasonable services have been provided" to keep families together under the dependency laws. Id. at 921.

Though Coalition does not specifically identify the basis for invoking 'mature seeds' analysis, it was inferably the result of the attenuation between the plaintiffs and the issues. For instance, the Court explains what hypothetically "could have" happened in a previous juvenile court proceeding if the underlying superior court order had been in effect in the past. Id. at 921-23 ("Under the trial court's order in the present case, the juvenile court judge hearing the dependency action could have ordered DSHS to provide housing assistance of some sort to Ms. Sanders....").

Harbor Plumbing does not ask the Court to allow adjudication of its claim based on what *could* have happened. Harbor raises an issue that *did* happen. It happened when the Legislature enacted an unconstitutional enabling statute. It happened again when the Department invoked the power of that statute to force electricians to wear their licenses. It happened again when the same Department invoked the same language to promulgate a worn plumbing license rule.

The assimilation of standing analysis into our state's justiciability rubric may also help discern what constitutes mature seeds. "Inherent in the... four [justiciability] requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." To-Ro Trade Shows, 144 Wn.2d 403, 411.

Satisfaction of the "UDJA standing requirement" that a plaintiff "have suffered an injury in fact," is logically incompatible with, and should defeat any finding of, merely hypothetical or speculative dispute. Benton County v. Zink, 191 Wn. App. 269, 278 (2015) *review denied,* 185 Wn.2d 1021 (citing Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 186 (2007); To-Ro Trade Shows, 144 Wn.2d at 414 (quoting Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 493-94 (1978)).

In Benton County, the appeals court found the county had indeed "suffered an injury for declaratory judgment purposes based on Ms. Zink's explicit threats to sue Benton County." Id. at 279.[4] The mere threat of litigation was sufficiently injurious to support a UDJA action because of the potential "uncertainty and cost of delay, including the per diem penalties for wrongful withholding [of records under the Public Records Act ("PRA")]." Id.

In Benton County, Ms. Zink had demanded her PRA records request be produced electronically, to which the county offered only paper or the option for Ms. Zink to pay an outside vender to create electronic copies. Id. at 272-73. Though Ms. Zink had not instigated, but only threatened, litigation, the county sought a UDJA declaration that its "decisions were lawful under the…[PRA]." Id. at 273.

[4] The trial court order employed the language of justiciability doctrine, though the appeals court shifted to a standing analysis. "There is an existing dispute between the parties regarding the County's authority and obligations under Washington's Public Records Act (PRA), and such dispute is not hypothetical and can be determined by a declaratory judgment issued by this Court." Benton County v. Zink, 191 Wn. App. 269, 276 (2015).

In other words, the PRA would have enabled Ms. Zink to sue the county, which could have -depending on the outcome of the litigation- resulted in great expense. In the instant case, RCW 18.106.020 *did* enable the Department to engage in rulemaking. Depending on the outcome of the rulemaking and any future instances, Harbor Plumbing and all the plumbers of our state (perhaps all licensees of any agency) face likely infringement of their civil rights and substantial financial penalty for disobedience.

Moreover, the Department has and will devote resources to enforcing an unconstitutional rule, and could be held liable for damages and attorney fees accumulated in years to come. If the threat of pro se litigation by Ms. Zink against Benton County constituted an injury, then a fortiori does the threat of the Department of Labor and Industries to infringe plumbers' rights, as proposed in the state register and as already perpetrated against electricians. With such injury comes at least the mature seeds of dispute.

In Lawson v. State, various plaintiffs had challenged a statute purportedly authorizing King County to take abandoned railway land without compensation for Plaintiffs' reversionary interest. 107 Wn.2d 444 (1986). Plaintiff Wrights' consolidated case was dismissed for lack of "actual, present and existing dispute, ...or the mature seeds of one" because the county showed "no present intent...to acquire th[e] right of way" across the Wright land. Id. at 460.

The other plaintiffs could proceed on remand because the railroad had begun the abandonment process for the section of right of way abutting their land. Also, the county had successfully petitioned the Interstate Commerce Commission to "impose a public use condition upon abandonment," so the county could have the option to purchase the abandoned land from the railroad for public trails. Id. at 446-48, 461.[5]

The Wrights had nothing but a hypothetical concern that the county would someday use the challenged statute to take their reversionary interest in a section of railroad separate from the "second right of way" section pending abandonment many miles away. Lawson, 107 Wn.2d at 446. There was no indication the county intended to do to the Wrights what it appeared poised to do to the other plaintiffs. While Ms. Zink had telegraphed her intent to sue, King County had made no indication of any such adversarial intent.

By contrast, RCW 18.106.020 is codified in the "Plumbing" chapter. Plumbers are specifically named in the legislative intent section, and a prefatory 'non-rule' has already been promulgated against them. CP at 23, 64. Moreover, plumbers are second on a list of three trades the statute is intended to reach and the first -the electricians- is already infringed by it. Id.

[5] The opinion was published in 1986. In 1988 the legislature added to the challenged statute, "Nothing in this section...authorizes a public agency or utility to acquire reversionary interests...without payment of just compensation." Laws of 1988 ch. 16, § 1.

The Wrights, situated on a different railroad section from the one being abandoned, had not even mature seeds of a dispute. Lawson, 107 Wn.2d at 460. The other land owners, like Benton County and Harbor Plumbing, saw that the proverbial writing on the wall was specific to them and were permitted, as should be Harbor, to litigate the statutes in light of looming infringements.

In Clallam Cty. Deputy Sheriff's Guild v. Bd. of Clallam Cty. Comm'Rs,, the challenged ordinance was alleged to be in conflict with a controlling statute. 92 Wn.2d 844 (1979). Though neither the statute nor the ordinance had been enforced, the Court premised its justiciability finding on seeds "readily germinating." Id. at 849. The case is discussed in greater detail infra at 5.4.a.

5.3 Justiciability prong 3 was satisfied by Harbor's direct and substantial interest in the constitutionality of the enabling statute, RCW 18.106.020.

In the trial court, the Department valued Harbor's interest in monetary terms, arguing that the cost of a replacement license is too small to be substantial. CP at 12. The Department also framed Harbor's interest as perfunctory, as an "interest…in not being encouraged to wear" the license. Id.

Harbor argued, and here maintains, that dollar amounts are inapplicable to matters of civil liberty, and that fear of 'encouragement' is a disingenuous characterization of its interest. As the Complaint explains,

"equal protection, privacy, speech, bodily autonomy, and choice of appearance" are implicated. CP at 5.

In De Cano v. State, the Court conditioned challenge to the "constitutionality of a statute" on the prerequisite showing "that it appears…[the plaintiff] will be directly damaged in person or in property by its enforcement." 7 Wn.2d 613, 616 (1941). This one sentence encapsulates Harbor's satisfaction of justiciability prong 3.

It appears that Harbor will suffer the same infringement of constitutional rights already being endured by electricians if the enabling statute is again 'enforced.' The landscape within the regulatory jurisdiction of the same defendant is highly informative of this 'appearance.' That same defendant, already responsible for the infringement of electricians' rights, has also already played brinksmanship with the plumbing section of the WAC, and is enabled to do so continually in the future.

Noting that the Court used future tense, "will be," in describing the requisite damage, Harbor anticipates imminent harmful conduct 'will be' consistent with the same defendant's ongoing treatment of electricians. It is reasonable to expect action consistent with what that same defendant initially proposed to inflict upon plumbers, irrespective of that defendant's last minute, evasive codification of a non-rule. After all, statutory authority remains in place.

Harbor's anticipation of imminent damage to its constitutional rights might be less substantial had the Department complied with RCW

34.05.340, which requires a supplemental notice and comment period where a final rule is "substantially different" from the proposal. See RP 12:11-16. Or, perhaps a non-rule is tantamount to a 'policy statement,' which would have no place in the WAC until it has been "long-standing" and the agency has seen fit to convert it from "advisory only" to a rule per RCW 34.05.230(1).

Harbor's rights might not appear to be at risk had the Department not already begun feigning enforcement of the mandatory worn license rule through its listserv, its Plumbing Certification Supervisor, and by proxy through the unions, back in March of 2016. CP at 50-62. The uncertainty created by the Department's odd use of the authority of RCW 18.106.020(1) could alone suffice to implicate Harbor's direct constitutional interest.

Like Mr. DeCano, whose land could be, but was not yet, seized under the alien land statute, Harbor is directly and substantially interested in the statute that could allow the Department to exercise control over the bodies and minds of the plumbers. DeCano, 7 Wn.2d 613, 616. And, like Mr. DeCano, Harbor has already seen it happen to others nearby.

5.4 Justiciability exception for 'Major Public Importance' is applicable.

Harbor had considered this doctrine the cornerstone of its defense to the Department's motion, though it did not receive much attention at oral argument below. Against the backdrop of recent worldwide rise in authoritarianism, Harbor had hoped that the public interest in mandatory affixation of state documents to the private body, and the mechanism

invented by the Department for evading judicial review, would be considered important to the public.

a. Ripeness.

As a threshold matter, the major public importance exception requires ripeness. See e.g. Walker v. Munro, 124 Wn.2d 402, 415-16 (1994); CP 22-24. Ripeness is met "if the issues raised are primarily legal, and do not require further factual development, and if the challenged action is final. ...[Also, c]urrent hardship is not a strict requirement for ripeness." Jafar v. Webb, 177 Wn.2d 520, 525 (2013).

> The ripeness doctrine exists "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."

Asarco, Inc. v. Dep't of Ecology, 145 Wn.2d 750, 759 (2002) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967)).

Harbor seeks only a legal determination of the facial constitutionality of the enabling statute, which requires no further factual development. The courts would not be entangled in an abstract policy disagreement because the enabling language has already been used twice by the same defendant to propose unconstitutional administrative rules, one of which was finalized in mandatory form, the other becoming a blemish on, or mutation of, the Washington Administrative Code.

Finality was contested by the Department on the basis that it "did not promulgate a rule requiring plumbers to wear [licenses] and ...has not enforced such a rule on Harbor...or anyone else." CP 89. This argument appears better suited to justiciability prong 1, but because of the doctrinal overlap is addressed here.

In Clallam Cty. Deputy Sheriff's Guild v. Bd. of Clallam Cty. Comm'Rs, there were two sources from which the Board could derive salary offers for use in bargaining with the Guild. 92 Wn.2d 844, 848 (1979). One source was an RCW, the other a county ordinance. Id. The Board argued "as long as those provisions are not enforced, no real dispute about the overlap exists and thus no justiciable controversy exists under the Uniform Declaratory Judgments Act." Id. at 849-50. The case was remanded. Id. at 948.

As in Deputy Sheriff's Guild, the case at bar pits one type of law - the supreme state and federal constitutions- against another. Here, though, the operative language has already been used. Where only bargaining had begun in Deputy Sheriff's Guild, here the Department invoked the statutory authority and opened a rule making procedure to infringe Harbor's constitutional rights. CP at 44, 51-61. Moreover, the operative language in RCW 18.106.020(1) has already been invoked by the Department to mandatory fruition against electricians.

The finality of the enabling statute language inheres in the fact that it was codified at RCW 18.106.020(1) and 19.28.271(1), and superlative

finality is achieved by the Department's proposal of a mandatory worn license rule and subsequent rulemaking, irrespective of its outcome. CP at 44. The very nature of an enabling statute is that it enables agency action. RCW 18.106.020(1) has no higher potential than to convey power to the Department. The power is conveyed and has been invoked and put to use.

The trial court, having previously refused to join the electrical plaintiff in this action, declined to consider the repetitious invocation of the same sentence of statutory authority by the same defendant. RP 8:12-9:25. Harbor respectfully requests this Court discount the formality of an independent WAC section number in favor of the substantive realities of the Department's recurring conduct. Harbor is but one fish in a barrel of shot fishes, estopped from challenging the singular shooter despite the same statutory gun being aimed and fired repeatedly.

Moreover, Harbor has felt the effects of the statutory language, as it necessitated enlisting counsel to investigate whether the rule was, indeed, applicable. The Department even directly affirmed that the worn license rule had been enacted, providing counsel with the mandatory version by email (counsel humbly admits naivete in accepting the Department's representation as a verity). CP at 44. The Department was even feigning enforcement of the mandatory rule language by proxy through the unions, listserv, and emails to plumbers. CP at 50-62.

After Harbor filed for an injunction, the Department finalized the 'non-rule' instead. Public records requests have yielded little insight as to

whether the last-minute change was inspired by Harbor's complaint. Though none is required for ripeness, Harbor bears a current hardship in keeping vigil over future attempts to infringe its rights by circumvention of APA notice requirements, providing false indicia of enforcement, and employing a new tool to escape challenge. Namely, codification of the 'non-rule.'

The final ripeness consideration overlaps prong 1 of justiciability, discussed supra at section 5.2. See e.g. Lewis County v. State, 178 Wn. App. 431, 440 (2013). The arguments raised supra in section 5.2, demonstrate the dispute is not an 'abstract disagreement.' Here, a proper framing of the issues is also helpful. The Department's improper framing is a hindrance transcendent of justiciability prong 1, ripeness, and overall public importance analyses.

The framing problem occurred when the Department shifted focus from the enabling statute to the 'apparatus' it had codified in the WAC (i.e. from the gun to the bullet in the metaphor, supra). CP at 14. Because the new WAC section is a 'non-rule' (or a 'blank' bullet), goes the argument, the enabling statute is not important. Though the Department has hidden behind the 'non-rule' talisman at every turn, nowhere is the veneer thinner than in ripeness analysis.

Quite simply, the language of the new WAC section is not being challenged, and should not be allowed to invade the ripeness analysis. CP at 3-5. Harbor pleaded that the enabling statute -RCW 18.106.020(1)- is

substantively, facially, unconstitutional and actionable under the UDJA. The challenge to the WAC is procedural and is pleaded separately, under the APA (though the Department's evasion of judicial review by non-rule promulgation is, perhaps, of a major public importance transcending both claims).

The Department's gambit of 'non-rule' promulgation should not render the implicated civil rights unimportant. Implicit in these proceedings, therefore, are two issues of major public importance.

b. Major Public Importance.

"'A petition for a declaratory judgment is particularly appropriate to determine the constitutionality of a statute when the parties desire, and the public need requires, a speedy determination of the public interest involved therein.'" Huntamer v. Coe, 40 Wn.2d 767, 771 (1952) (quoting Anderson, Actions for Declaratory Judgments 1413 (1951)).

The proper framing of the first publicly important issue is "whether the legislature may empower regulatory agencies to force potentially millions of private Washingtonians to wear licenses." CP at 24. The proper framing of the second publicly important issue is 'whether the Department's last-minute insertion of a 'non-rule' into the WAC serves to buffer the enabling RCW from judicial review.'

Although the Department portrays a "rare" and narrow exception, 'major public importance' holdings are quite eclectic. CP at 13. The doctrine has applied in "cases involving, for example, eligibility to stand for

public office, freedom of choice in elections, and the constitutionality of excise taxes." Lewis County v. State, 178 Wn. App. 431, 440 (2013). Even salary, tenure, and privacy of conversations have been adjudged important enough. See also Wash. State Coal. for the Homeless v. Dep't of Soc. & Health Servs., 133 Wn.2d 894, 917 (1997) (citing State ex rel. O'Connell v. Dubuque, 68 Wn.2d 553, 559 (1966) and State ex rel. Distilled Spirits Inst., Inc. v. Kinnear, 80 Wn.2d 175, 178 (1972).

The worn license requirement implicates fundamental constitutional rights including bodily autonomy and integrity, freedom of choice and association, privacy, and speech. As a derivative of the democratic body politic, the Department should be presumed to desire a determination, which should occur urgently, given its repeated past, and imminent future, conduct.

It is difficult to find examples of private citizens ever having been forced to wear state documents. In the companion case, the electrical plaintiff has drawn the Department's scorn for cautiously noting the state symbols once affixed to various classes of private citizens in Germany. The plaintiffs would also much prefer a different example, if one were readily available.

There may be temptation to diminish the importance of the worn license by analogy to protective gear requirements. However, it is difficult to imagine anything more narrowly tailored to the compelling interest of, for instance, life sustaining cranial protection than a hard hat, or safety

glasses to keep eyeballs from being punctured. And, these items work no visceral invasion into the minds and spirits of the private citizens protected by them. Nor do they communicate the allegiance or obedience of their wearer, or betray her identity.

At the time of the trial court hearing, one single executive agency had issued over six million licenses. CP at 47-48. While Harbor acknowledges that many citizens have more than one license, and that a different agency is the party here, the statistics nonetheless indicate that an enormous swath of the public would find the issues important.

Anecdotal and hypothetical considerations of potential 'slippery slope' societal impact appear throughout 'major public importance' jurisprudence. For example, the seminal Huntamer v. Coe opinion cites the "considerable public interest and importance" underlying mandatory oaths of allegiance by political candidates. 40 Wn.2d 767, 770 (1952).

The three plaintiffs in Huntamer wanted to become candidates, but did not want to swear the particular oath required by law. Id. at 768-70. Though the plaintiffs had neither taken nor refused to take the oath, and though the oath applied only to those few citizens seeking office, the court nonetheless considered them, in the abstract, "of tremendous importance in the organization and functioning of society since very ancient times." Id. at 771.

The Court's willingness to apply the public importance exception was infused with the potential and hypothetical impacts on society. Id. at

772. The opinion invoked images of seventeenth century British Parliament, from which oaths to the queen had effectively banned "members of the Roman Catholic Church." Id. at 773. The decision to take up review was also influenced by the visceral and even metaphysical implications of an invisible "bond that keeps the state together" and a deterrent of "Divine vengeance upon false swearing." Id. at 772 (quoting Lycurgus, Oratio in Leocratum, 80 and 6 Wigmore on Evidence 285).

The state forcing citizens to swear a cursory oath (a requirement ultimately upheld by this Court) is similar to, yet far less invasive of the mind and body than, the worn license requirement. Harbor and countless other private Washingtonian citizens would be viscerally wounded by forced submission to such state power, not to mention the added physical nuisance of donning the state imprimatur until the end of one's career, and revealing publicly one's identity and status by compulsion.

The oath, moreover, is a rite of passage mandated when its taker crosses the threshold from private to public life. Application of such a rite to the private citizen is of concern to all citizens -Harbor among them- who have no desire to enter public life. The high number of potentially impacted citizens ('numerosity' perhaps) is also a criterion indicative of major public importance found in precedent.

For example, in To-Ro Trade Shows v. Collins, this Court first hints at a different outcome if more citizens had been "waiting in the wings to" benefit by adjudication on the merits. 144 Wn.2d 403, 415 (2001). The To-

Ro plaintiff was an RV show producer asserting the purported right to host, in a Spokane show, an Idaho RV vender not licensed by our state. Id.

Though the opinion is mostly centered on the lack of any semblance of justiciability, the public importance doctrine is briefly addressed. Id. at 416-18. To this end the analysis covers the nature of the interest, the clarity of existing rights, and the small number of impacted citizens. Id. at 417.

The Court first characterizes To-Ro's interest as "commercial," which would seem to rank well below the grave implications of forced oath and submission to bodily attachment of state papers. Id. at 416. The Court then cites the dearth of "confusion" an adjudication of the merits would dispel. Id. at 417. In stark contrast, a ruling on the legislation that has already spawned unconstitutional restrictions on thousands of electricians, is intended to reach two other industries regulated by the Department, and has created a perplexing mutation of the administrative code governing plumbers, would allay mass confusion.

Finally, the To-Ro Court returns to the low numerosity value of an opinion on the merits, stating "this challenge to the dealer licensing statute arose out of a particular situation in 1994 when To-Ro attempted to fill out an underbooked show by extending a belated invitation to an unlicensed dealer." Id. The worn license requirement is not so particularized. Already it burdens electricians, has been foisted in a perfunctory and calamitous fashion upon the plumbers, immediately threatens 'conveyance workers,'

and could spread to the holders of over six million licenses in this state. CP at 64-5; RP 9: 19-23.

In this 'public impact numerosity' connection, Harbor is also concerned with the potential universal application of the Department's newfound APA workaround. If the Department can invoke an unconstitutional enabling statute multiple times and, when finally confronted, escape judicial review by codifying a 'non-rule,' what is to prevent this protocol from systematization? Systemic technocratic overreach is addressed more thoroughly under the APA discussion at 5.7, infra.

5.5 Capable of repetition yet evading review/substantial or continuing public interest.

This doctrine only appears in mootness cases. "A case is moot if a court can no longer provide effective relief." In re Cross, 99 Wn.2d 373, 376-77 (1983). From Harbor's perspective, the practical effect of the Department's last-minute enactment of a 'non-rule,' was that it mooted the original injunctive and constitutional claims, which Harbor dropped.[6]

The trial court dismissal of the remaining claims was also triggered by the switch to a non-rule. Therefore, though couched in justiciability, mootness analysis might have been equally applicable. Mootness is encompassed within justiciability. See To-Ro Trade Shows, 144 Wn.2d 403, 411.

[6] Harbor initially challenged the mandatory rule language that had been provided to counsel, the unions, and the listserv.

Though not expressly adopted, the federal 'capable of repetition yet evading review' exception has been embraced to some degree by the court of appeals under the assumption that an appropriate case has not yet been taken up by this Court. See Hart v. Dep't of Soc. & Health Servs., 111 Wn.2d 445, 451 (1988) (Declining to adopt the exception "at this time."); e.g. Client A. v. Yoshinaka, 128 Wn. App. 833, 842 (2005). This Court has again hinted at potential acceptance of the federal exception. In re Dependency of M.H.P., 184 Wn.2d 741, 752 n.5 (2015) (dicta indicating motion to dismiss for mootness denied possibly because of repetition and evasion of review).

The opinions from the court of appeals tend to carefully embrace the federal exception either alongside or incorporated within the longstanding state exception for "issues of continuing and substantial public interest." Client A., 128 Wn. App. 833, 842 (citing In re Marriage of Horner, 151 Wn.2d 884, 891 (2004)). In State v. Clark, for example, Division 2 conflated the two doctrines: "The appellate court also will review issues of public interest that are capable of repetition yet easily evade review." 91 Wn. App. 581, 584 (1998). In any case, the challenge to RCW 18.106.020 would resolve an issue capable or repetition yet evading review that is also of continuing and substantial public interest.

The "three criteria" used to determine whether an issue is of continuing and public interest are: "'(1) the public or private nature of the question presented; (2) the desirability of an authoritative determination

which will provide future guidance to public officers; and (3) the likelihood that the question will recur.'" In re Dependency of A.K., 162 Wn.2d 632, 643 (2007) (quoting In re Det. of Swanson, 115 Wn.2d 21, 24 (1990), (quoting Dunner v. McLaughlin, 100 Wn.2d 832, 838 (1984)).

The In re Dependency of A.K. opinion acknowledged that, although "due process rights...are individual rights, the public has a great interest in the care of children and the workings of the foster care system." Id. at 643-44. Harbor's constitutional rights are already interconnected with the large population of electrical workers. Moreover, since virtually every adult member of the public is licensed by one agency or another, the public interest in state-mandated wearing of credentials eclipses the reach of foster care interests.

The legislature and all executive agencies, especially the Department that has already infringed the rights of electrical workers, are very much in need of authoritative guidance as to how far the constitutions will allow them to go in regulating the minds and bodies of private citizens. This is especially so given the nontechnical nature of a worn license requirement and its suitability to the province of judicial expertise.

Recurrence has already happened and will likely happen again. First, the electricians were forced to wear state documents. See WAC 296-46B-940. Then, the plumbers were furtively and falsely ordered to do so. CP at 44; 50-62. In the future, the perfunctory infringement against

plumbers may come to binding fruition, under the continuing enablement of RCW 18.106.020(1).

The 'non-rule' and enabling statute hanging over the heads of Washington plumbers also satisfy the federal exception requirement of "'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party.'" Hart v. Dep't of Soc. & Health Servs., 111 Wn.2d 445, 452 (1988) (quoting Murphy v. Hunt, 455 U.S. 478 (1982) (citation omitted)).

Moreover, the legislative intent section underlying both RCW 18.106.020 and 19.28.271 indicates that "conveyance workers" are a third target. CP at 64-65. And the slippery slope leads to a pool of over six million licenses. CP at 47-48. The capability of evading review is further demonstrated in section 5.7 infra.

5.6 Standard of review for APA and CR 12(b)(6) dismissals.

De novo review is appropriate. Harbor dismissed its facial challenge to the worn license rule when the Department finalized the non-rule version, however the challenge to "rule-making procedure" remained in the Complaint. CP at 5. The amorphousness of WAC 296-400A-024 made it a stumbling block in the analysis below. RP 11:9-12:20; 14:2-15:13; 16:21; 17:21-18:15; 19:11-22; 20:11-21:4.

De novo review will apply should the Court undertake the threshold determination of what legal species was codified, and whether the Department has statutory authority to codify such advisory language in the

WAC. "The meaning of a statute is a question of law reviewed de novo." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9 (2002) (citing State v. Breazeale, 144 Wn.2d 829, 837 (2001); State v. J.M., 144 Wn.2d 472, 480 (2001)).

De novo review is also appropriate to CR 12(b)(6) dismissals. FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 180 Wn.2d 954, 962 (2014). A CR 12(b)(6) motion decided on matters outside the pleadings is treated as summary judgment. Brummett v. Wash.'s Lottery, 171 Wn. App. 664, 673 (2012).

The trial court did not strike the "materials in the record" but did consider them not "necessary to the court's decision." RP 6:18-7:8; 9:5-16; 12:24-13:9; 13:17-22; 19:23-20:2. However the court did also discuss Harbor's exhibits, which contain the legislative intent section of the enabling statute and the Department's communications about the worn license 'rule.' RP 13:17-22. The dismissal order expressly denied the motion to strike Harbor's exhibits. CP at 95.

5.7 The APA challenge to rulemaking procedure was well pleaded.

"An action may be dismissed under CR 12(b)(6) only if 'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.'" Lawson v. State, 107 Wn.2d 444, 448 (1986) (quoting Bowman v. John Doe, 104 Wn.2d 181, 183 (1985) (quoting Orwick v. Seattle, 103 Wn.2d 249, 254 (1984); Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wn.2d 959, 961 (1978)).

Harbor challenged the procedure followed by the Department in promulgating the 'apparatus,' WAC 296-400A-024(3). At summary judgment, the Department successfully argued that this "non-rule" was beyond the reach of the APA because it "does not qualify as a 'rule' under...RCW 34.05.010(16)." CP at 15-16.

Harbor abstained from arguing that a 'non-rule' is a rule, and instead argued that APA rule-making requirements apply to rule-*making*, which precedes the existence of a rule (and now, apparently, 'non-rules' as well). Harbor also argued that, regardless of the species codified, anything codified by an executive agency should fit somewhere in the taxonomy of RCW 34.05.570 (as a rule, agency order, or other agency action). RP 11:13-12:3.

The trial court, in finding that the codified apparatus did not fit the definition of rule, concluded it was beyond the scope of Harbor's RCW 34.05.570(2) challenge. RP 16:24-17:7. RCW 34.05.570 sets forth the subject matters and standards appropriate for judicial review. The 'non-rule' finding is problematic on various levels.

a. Problems with non-rule status.

First, RCW 34.05.570(2)(c) does allow for invalidation based upon adoption "without compliance with statutory rule-making procedures...." The Complaint alleges the Department fell procedurally short of satisfying the rule proposal summary requirements of RCW 34.05.320. CP at 5. Therefore, the claim appears well pleaded.

On the other hand, RCW 34.05.570(2) only allows for such procedurally-based invalidation of "rules." Having decided that WAC 296-400A-024 is a non-rule, the trial court therefore rejected RCW 34.05.570(2) as a proper basis for challenge. RP 19:11-22. The tandem functionality of RCW 34.05.320 and .570(2)(c), however, indicate an intent that procedural defects should be subject to challenge.

If this Court were to imply into the broad RCW 34.05.010(16) definition of rule, something like 'that which has been proposed, promulgated, and added to the WAC,' then the semantic knot would be untied. It may also be helpful that, under RCW 34.05.010(16)(e), "[t]he term ['rule'] includes the amendment or repeal of a prior rule...." Of course, given that WAC 296-400A-024 is a new (as opposed to 'amendatory') section, such a reading might not reach it.

This concern would be tempered by a narrow holding that, because plumbers had already been required to physically possess their licenses while working, the assignment of a new WAC number is merely a formality. In that instance, the new language might be considered substantively equivalent to an 'amendment' of the existing rule.[7]

Or perhaps the binding subsections, WAC 296-400A-024(1) and (2), serve to classify the whole of the section as a rule susceptible to procedural challenge:

[7] For instance, the antecedently promulgated WAC 296-400A-140(1) instructs enforcement personnel to "determine whether [e]ach person doing plumbing has their department issued certification card...in their possession...."

> (1) The certificate must be immediately available for examination at all times.
> (2) The individual must also have in their possession governmental issued photo identification.

Harbor finds no authority for the Department's insistence that an entire WAC section is a 'non-rule' simply because one subsection is classified as such (if, in fact, there is such thing as a non-rule).

Though there is no apparent precedent to guide classification of an apparatus such as WAC 296-400A-024(3), the thing looks quite like a rule through the lens of common sense. While ostensibly defanged by the added words "and is encouraged to," the next three sub-paragraphs prescribe very detailed methods of compliance. Id. (reproduced supra at pg. 2).

The ratio of permissive to commanding language in WAC 296-400A-024(3) conjures analogy to a police officer, judge, or other authority figure 'suggesting' a citizen have a seat. 'On the third chair from the left, feet apart and not crossed, hat doffed and not donned, head up and eyes forward unless the sun is too bright and no sunglasses are possessed, though reading glasses are not sunglasses.' Just a suggestion?

Finally, although the Department and trial court agreed that the apparatus was not a rule, it may fit the definition of "statute." RCW 34.05.010 does not define statute, though it is incorporated into the definition of other 'agency action.'

> 'Agency action' means...the implementation or enforcement of a statute, the adoption or application of an agency rule or order, the imposition of sanctions, or the granting or withholding of benefits.

RCW 34.05.010(3).

"[A] statute should, if possible, be so construed that no clause, sentence or word shall be superfluous, void, or insignificant." Groves v. Meyers, 35 Wn.2d 403, 407 (1950). Since "statute" and "rule" are both used in the definition, they are presumably not intended to carry identical meanings. If the combination of non-rule and rule amounts to a statute, the improper notice during 'implementation,' as alleged by Harbor, could be adjudicated as a challenge to 'other agency action' under authority of RCW 34.05.570(4).

Finally, Harbor stands by the original argument that it should not matter what substantive apparatus was finally codified when, as here, an agency has flouted the procedural prerequisites. The legislature intended the APA "to provide greater public...access to administrative decision making...." RCW 34.05.001. An APA violation has occurred and should be addressed irrespective of events occurring downstream. To hold otherwise is to disregard the legislative intent of the APA.

b. Problem with code pleading requirement.

Harbor's second concern is that the trial court may have embraced a code pleading requirement. RP 19:11-22. The court appeared to accept the Department's argument that, because Harbor pleaded RCW 34.05.570(2), any later determination that the codified apparatus is something other than a rule would defeat a challenge under another, appropriate, subsection. RP 16:7-12.

"Washington is a notice pleading state and merely requires a simple, concise statement of the claim and the relief sought." Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 352 (2006). In our state, Harbor's recitation of RCW 34.05.570(2) should not preclude challenge under whatever other subsection is deemed appropriate when and if the codified apparatus is judicially defined. RP 11:13-25; 14:2-6 (e.g. as 'other agency action').

c. Problems with finding a policy statement.

The trial court also characterized the non-rule as a "policy statement," which the legislature encourages agencies to "convert...into rules." RCW 34.05.230(1); RP 17:25-18:9. Of course, inherent in conversion from policy to rule is the distinction between the two.

> [I]ssuance of interpretative statements is not governed by formal adoption procedures. There is no need for formal procedures because such advisory statements have no legal or regulatory effect. A person cannot violate an interpretive statement, and conduct contrary to the agency's written opinion does not subject a person to penalty or administrative sanctions. The [agency]'s advisory statements serve only to aid and explain the agency's interpretation of the law.

Wash. Educ. Ass'n v. Wash. State Pub. Disclosure Comm'n, 150 Wn.2d 612, 619 (2003).

Facially, the language of the 'non-rule' appears to fit within the definitions of either "interpretive statement" or "policy statement." RCW 34.05.010(8) and (15). Therefore, according to Wash. Educ. Ass'n., there should have been no preproposal statement of inquiry (CR-101), no

proposed rulemaking (CR-102) and certainly no advisory language codified in the WAC. 150 Wn.2d at 619.

Indeed, the trial court pinpointed exactly what should have happened if the codified apparatus is in fact a policy statement. RP 17:25-18:9. The court correctly stated that RCW 34.05.230 would apply in that case. Harbor disagrees, however, that proposed "rules…go through the rulemaking process that are advisory that still are enacted under the WAC…[and that] certainly the APA acknowledges [such]…mandatory rules and advisory rules." RP 18:11-15.

The Department files policy statements with the Office of the Code Reviser, which publishes them in the Washington State Register, though they are not codified in the WAC.[8] The language of WAC 296-400A-024 was not filed as a policy statement in the Washington State Register.

There remains one more possibility. Perhaps the Department did nothing. The trial court discussion reveals, "if instead of adopting a final rule that encouraged plumbers to wear their credentials the agency had simply said ['']we're not promulgating a final rule at this time ['']," then RCW 34.05.340 would have applied. RP 12:11-20.

Under RCW 34.05.340(1) "an agency may not adopt a rule that is substantially different from the rule proposed in the published notice of proposed rule adoption…" without following an alternate procedure. Of

[8] The Department's filings are available online at the WSR website: http://lawfilesext.leg.wa.gov/law/wsr/2016/16+WSR+Index+L.htm..

course, whether adoption of a non-rule is tantamount to adoption of a substantially different rule, is also an issue of first impression.

d. Problems with sequence of APA requirements.

The trial court held that WAC 296-400A-024 "is not a rule under the APA" and therefore cannot be challenged under RCW 34.05.570(2). RP 19:12-13. The holding assumes retroactive mooting of a claim (improper rule summarization) attached to an event and a thing that undeniably occurred and existed in the form of a filed rule proposal summary. It is a confounding of the logical temporal sequence of events.

> Rule-making procedures under the APA involve providing the public with notice of the proposed rule and an opportunity to comment on the proposal. See RCW 34.05.320, .325. The purpose of rule-making procedures is to ensure that members of the public can participate meaningfully in the development of agency policies which affect them.

Hillis v. Dep't of Ecology, 131 Wn.2d 373, 399 (1997).

For the same reason that a chicken cannot preexist its own egg, a codified apparatus cannot preexist the rulemaking procedure that created it. However, this anachronism inheres in the statutes as applied below.

First, RCW 34.05.310 sets forth a strict "statement of inquiry" procedure that the Department "must follow" (which manifests as a CR-101 form filing). CP at 70. Next, RCW 34.05.320 mandates the timing and contents of the rule proposal the Department "shall" follow (which

manifests as a CR-102 form filing).[9] After these APA mandates have been completed, a proposed rule is either finalized, abandoned, or subjected to more notice and comment because it has changed substantially per RCW 34.05.335 et seq.

On a temporal plane, any violation of rulemaking statutes could only precede finalization of a rule. In a rational world, the later-enacted "rule" could then be challenged on the basis that it "was adopted without compliance with statutory rule-making procedures...." RCW 34.05.570(2)(c).

The sequential logic is upended when, after allegedly defective rulemaking, an agency adopts a 'non-rule.' In that case (goes the Department's argument) the lack of a rule retroactively precludes the violation of rulemaking protocols, even though it happened. The legal fiction is that if A happens but then C happens instead of B, A never happened (or it no longer matters that A happened, which is equally unsupported by statute).

Under the safe assumption that the legislature was not contemplating a temporal legal fiction when it adopted the APA, Harbor hopes the Court will apply a statutory construction that accounts for the realities of sequence. *Expressio unius est exlusio alterius* could lead to the conclusion that the "express inclusion in [RCW 34.05.570(2) of the word

[9] Harbor has alleged that the Department's rule proposal summary "glossed the rulemaking as 'housekeeping' and the new assertion of control over the plumbers' bodies as 'displaying' license cards." CP at 5.

"rules"]...implies that other [types of codified apparatus] are intentionally omitted." In re Det. of Strand, 167 Wn.2d 180, 190 (2009). "But even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974) (citing Neuberger v. Commissioner, 311 U.S. 83, 88 (1940)).

According to RCW 34.05.001, the pertinent legislative intent behind adoption of the APA was to "provide greater public and legislative access to administrative decision making." If RCW 34.05.570(2) is interpreted to allow for last-minute non-rule adoption as a retroactive bar to prior violations of rule-making procedure, then the public will be effectively cut out of administrative decision making in a rather magical fashion.

e. Authority problem: Executive agency is not authorized to create exceptions to judicial review.

The CR 12(b)(6) dismissal below was in accordance with and ratification of an unwritten APA judicial review exception for 'non-rules,' created by the Department without statutory authority. The Department's use of its self-styled exception is best viewed in the context of the worn license rule's history. Though it has the benefit of being based on true facts, the following model could be applied by any agency going forward.

Step one: The agency proposes to make one group wear their licenses. Because the proposal contains no public notice, the unwitting group does not challenge the infringement and it becomes code. With little

or no enforcement, the two-year APA statute of limitations for procedural challenges slips by. See RCW 34.05.375.

Step two: The agency then repeats the process as to another group. Again, without APA-compliant public notice, there is little or no public comment. The agency again may refrain from active enforcement for a couple years, keeping the rule's existence relatively unknown to most.

Step three: this time, however, the violation of procedure is discovered by a conscientious citizen before the statute of limitations runs. No matter, for the agency merely evades review by codifying a 'non-rule.' See RP 14:11-15:13; 20:11-21:3.

It is bad enough that rules can be promulgated and finalized in secret, then left to incubate during the time allowed for challenging them on procedural grounds. Now, on top of it all, the Department has carved out its own APA exception to bail out of judicial review if procedural iniquities are exposed. The public is eliminated from the equation.

In an apparent mixture of judicial deference and willingness to read between the lines of the APA, the trial court seemed to adopt the 'no harm, no foul' paradigm of the Department. However, the legislative twisting of procedure by an executive agency is itself a constitutional harm.

> When an administrative agency applies law in a quasi-judicial capacity, it does so under the constraints of due process, such as is embodied in the Administrative Procedure Act, and of ultimate review by courts. This emphasizes one danger inherent in departures from the rule of separation of powers: when a governmental power is exercised by a branch other than that ordinarily responsible, the specific guarantees of

> governmental regularity applicable to the ordinarily responsible branch are in effect short-circuited.

Chadha v. Immigration & Naturalization Serv., 634 F.2d 408, 431 n.32 (9th Cir. 1980).

The Department's erratic behavior is a stark example of 'short-circuited' regularity owed Harbor and the public. When our society became so complex that some technocratic governance was necessitated within the greater "overhead democracy," the APA was eventually adopted to strike the careful balance between the two.[10]

The APA recognizes that "substantial judicial deference to agency views would be appropriate when an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise." Hillis v. Dep't of Ecology, 131 Wn.2d 373, 396, 932 P.2d 139, 151 (1997) (citing William R. Andersen, The 1988 Washington Administrative Procedure Act--An Introduction, 64 Wash. L. Rev. 781, 844 (1989)). The APA's strict procedural confines are a tradeoff for and safeguard against this substantive deference.

Here the trial court was very respectful of agency expertise, refusing to join the companion case, and refusing to consider even for the mere

[10] Sidney A. Shapiro & Ronald F. Wright, The Future of the Administrative Presidency: Turning Administrative Law Inside-Out, 65 U. Miami L. Rev. 577, 581-85 (2011), See also Sidney Shapiro et al., The Enlightenment Of Administrative Law: Looking Inside The Agency For Legitimacy, 47 Wake Forest L. Rev. 463 (2012).

purpose of supplying context, the repeated use by the same defendant of the same language to accomplish the same goal. RP 8:25-9:25. However, the unconstitutional affixation of state-issued credentials to the private human body is not worthy of any judicial deference whatsoever. It is absolutely nontechnical and completely within the expertise of the judicial branch, as is the Department's adventure into the legislative realm.

Under CR 12(b)(6), if any set of facts could exist, whereby "plaintiffs can prove their allegations, they would be entitled to the relief they seek." Lawson v. State, 107 Wn.2d 444, 449 (1986). But for the Department's unauthorized legislating of a new judicial review exemption, Harbor could prove that the rule summary provided by the Department at the rule proposal stage did not satisfy the strictures of RCW 34.05.320.

6. 'ATTORNEY FEES AND COSTS' ARGUMENTS

6.1 Attorney fees awarded under RCW 4.84.080 should be reversed and shifted to Harbor on successful appeal

The trial court awarded the Department "$200 for statutory attorney fees...." CP at 95. CP at 93. The statutory award amount is set by RCW 4.84.080. The award is based on "prevailing party" status under RCW 4.84.030. "[A] prevailing party is generally one who receives a judgment in its favor." Schmidt v. Cornerstone Invest., 115 Wn.2d 148, 164 (1990).

If the Court reverses the trial court's ruling, the Department will no longer be the "prevailing party" under RCW 4.84.010 and 030. The award below should be reversed and Harbor should receive the same on appeal under RCW 4.84.080(2).

6.3 Attorney fees and costs should be awarded to Harbor on appeal per the Equal Access to Justice Act, RCW 4.84.340 et seq.

Under RCW 4.84.350(1), "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees...." RCW 4.84.350(2) caps the award at $25,000 "for each level of judicial review...." Costanich v. Dep't of Soc. & Health Servs., 164 Wn.2d 925, 927 (2008).

"A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought." RCW 4.84.350(1). Harbor is a qualified party because it is a sole proprietorship worth far less than "five million dollars" at all relevant times. RCW 4.84.340(5). Upon prevalence in appealing the substantive holdings underlying the trial court's rulings, including but not limited to a determination that a 'non-rule' may not be codified in the WAC, Harbor requests fees and costs.

6.4 Costs should be awarded to Harbor under RAP 14.2

If Harbor prevails, it should be awarded the costs of appeal as provided by RAP 14.3. If prevalent, Harbor will file a cost bill as required in RAP 14.4.

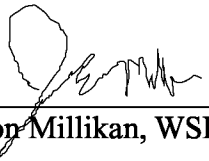
7. CONCLUSION

The statutory language enabling the Department to require worn occupational licenses is ripe and Harbor's challenge is justiciable or need not be. The rule promulgation, such as it is, can and should be challenged under the APA regardless of the nature of the finalized apparatus.

Harbor respectfully requests the Court also determine the legal pedigree of WAC 296-400A-024(3), and whether such a legal apparatus may be codified in the WAC. Harbor additionally seeks remand with instructions for proper adjudication on the merits.

Declaration of Service

The undersigned hereby declares under penalty of perjury by Washington State laws that he served this brief on all necessary parties according to the terms of the parties' electronic service agreement on this 16th day of June, 2017, from the Law Office of Jackson Millikan in Thurston County,



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